(1)

Supreme Court, U.S.
FILED

NOV 8 - 2004

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No. 04-[redacted]

IN THE SUPREME COURT OF THE UNITED STATES

Max Monroe,

Petitioner,

v.

City of Richmond,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Richmond, Virginia 23220
(804) 788-8892
Pro se

Pro se for Petitioner

QUESTIONS PRESENTED FOR REVEIW

1. The statute in question, the Americans with Disabilities Act of 1990 (ADA)

42 U.S.C. § 12112 (b) (5) (A) (1994) (it is a form of discrimination to fail to provide a reasonable accommodation "unless such covered entity can demonstrate that the accommodation would impose an undue hardship . . .") A modification or adjustment is "reasonable" if it "seems reasonable on its face, i.e., ordinarily or in the run of cases;" this means it is "reasonable" if it appears to be "feasible" or "plausible." An accommodation also must be effective in meeting the needs of the individual. In the context of job performance, this means that a reasonable accommodation enables the individual to perform the essential functions of the position.

In this matter, under ADA "reasonable accommodations," the Petitioner was given a task of raising daily four outdoor flags under the threat of "disciplinary action" by the respondent. This task was approved by the employer's approved treating Doctor, but later the same Doctor issued restrictions disallowing the use of the Petitioner right's hand and arm in any repetative task. The task required the use of both hands to accomplish. The Respondent knew the Petitioner was being injured by the approved duties but failed to change the approved duties. The Respondent forced the Petitioner to work against the new restictions. The Petitioner within days was twice injuried performing the task in wind storms and was reqired to continue performing the task under the threat of "disciplinary action" by the respondent until the Petitioner was placed out of work by the Virginia Workmen's Compensation Commission. The Doctor and the Respondent knew the Petitioner was being injured by the approved duties but failed to change the approved duties.This seems to be a common practice. The Petitioner filed a motion

for summary judgment arguing that the task laced with harassment of raising [4] flag(s) can not be performed with one hand, was restricted and was not a reasonable accommodation which lead to further injury and that the evidence on record proved the case. The motion was denied by the trial Court and the Court of Appeals affirmed. The Court felt, if the Doctor had approved the task [regardless of the restrictions] it was a reasonable accommodation.

The question presented, therefore is whether an alleged "reasonable accommodations" can be considered a reasonable accommodation if the task required and the restrictions imposed are diametrically opposed to the physical nature and laws of physics required to complete the task although approved by a Doctor and used by the employer, under the Americans with Disabilities Act of 1990 (ADA) as reasonable accommodations.

2. The statute in question, 18 USC Perjury.

When a person, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the U.S. authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or in any declaration, certificate, verification, or statement under penalty of perjury, willfully subscribes as true any material matter which he does not believe to be true; 18 USC.

In this matter, On April 22, 2003, the Petitioner in a letter to a harasser, *Mr. Letteri*, with copies sent to the Petitioner's immediate Supervisor, the harasser's Supervisor, Human Resources, as well as Risk Management, demanded an end to the harassment and for an investigation of the harassment The Respondent

had replied in their sworn answer to an interrogatories request, *"...the City answers that it is not aware of a properly reported charge of harassment by Plaintiff concerning Mr. Letteri. Consequently, the City is not aware of a responding document."* The Petitioner filed an Appeal arguing that the Respondant had failed to investigate the harrassment charge and had commited perjury by claiming they were, "not aware" of a charge of harassment when the evidence presented to the Court clearly showed otherwise, which is proven in the Court record of the case. The Appeal was denied and affirmed by the Court of Appeals.

The question presented, how can a Respondent who the evidence clearly shows had broken the law covering workplace harassment and committed perjury, be believed, prevail and be given judgment by the Court of Appeals.

PARTIES TO PROCEEDING

All parties to the proceeding are identified in the caption.

Max Monroe/Petitioner [Pro se]
City of Richmond [Respondent]
Stephen M. Barnett [Attorney for the Respondent]

CORPORATE DISCLOSURE STATEMENT

A Corporate Disclosure Statement has been filed with the U.S. 4th Circuit Court of Appeals for this case and has been made part of the Court record. There are no parents or publicly held companies.

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The opinion in the Petitioner's direct Motion for Summary Judgment to the United States Court of Appeals for the Fouth Circuit Court, Max Monroe v. City of Richmond is printed in the appendix to the petition for writ of certioari ("Pet. App.") at 1a. The District Court's opinion denying Petitioner's Motion for Summary Judgment, is at Max Monroe v. City of Richmond is at ("Pet. App. 2a"). The order denying the petition for rehearing. ("Pet. App. 4a"). The Appeal Court's Unpublished opinion is at ("Pet. App") at a5. Judges Niemeyer, Williams and Traxler.

JURISDICTION

On August 12, 2004 the Court of Appeals affirmed the ruling. On September 21, 2004, the Court of Appeals denied the petition for rehearing. The petition for writ of certiorari was timely filed on November 8, 2004. This Court has jurisdiction under 28 U.S.C. § 1234(1).

CONSTITUTIONAL PROVISION AND STATUTES

Provisions of the following are in pet. App. 5a, 18 USC, 6a, 42 U.S.C._§ 12112 (b) (5) (A) (1994) and 7a, 42 U.S.C. § 1981a (a) (3) (1994).

STATEMENT OF THE CASE

Proceeding in the Courts Below

The Petitioner, initially injured on May 18, 2001 while lifting a heavy desk in the Children's department of the Main Library, immediately reported the injury to his supervisor, Mr. Ted Chewning. Over the next several weeks, repeated requested from the Petitioner to his two immediate Supervisors for the medical form/accident report needed to gain medical help from OccuHealth, the City's employee health management firm, for job related injuries, went unanswered and the Petitioner was mocked. One Supervisor referred to the Petitioner as the "One Armed Bandit," in front of numerous witnesses after the Petitioner began asking for medical aid from his Supervisor in weekly supervisory meetings.

On August 14, 2001 The Petitioner - while at work received a permanent injury to his right index finger on, due to an accident caused by the weakness and pain in his untreated right arm. After a meeting on October of 2001 with the City's Safety Officer, Mr. Dick Chaddick, Human Resources Director, Mr. L. Chester Brazzell and D.P.W. Deputy Director, Mr. Ellis Henderson the Petitioner informed them of the problem in obtaining medical help for the May 18, 2001 injury, The Petitioner received the first medical attention for the 5-month-old injury, in October of 2001. Treatment proved difficult and the problem worsened. The City was constantly updated as to the lack of progress by its health management company OccuHealth.

The City of Richmond received a copy of the medical report from Doctor Lloyd A. Bonner, the Petitioner's Private Family Physician dated, December 10, 2002, reporting chronic right lateral epicondylitis, which developed after the work related injury of May 18, 2001.

The City of Richmond - OccuHealth health management company approved treating physician Doctor Charles H. Bonner [no relation] did on January 27, 2003 craft a document in the form of a report to the City of Richmond, (which would be later used under ADA as "reasonable

accommodations") which indicted with regard to the Petitioner's ability to perform essential functions of his job. Doctor Charles H. Bonner reported the Petitioner could, execute displaying the U.S. flag daily [a task handled by the Maintenance Staff and Building Security for 30 plus years and not the Custodial Staff to which the Petitioner belonged] set-up rooms for special events, replace restroom supplies and replace light bulbs. The plaintiff wrote *"yes"* to the question, "Do you consider the restrictions to be permanent?" The treating physician composed another report dated February 4, 2003 which was transmitted to the City of Richmond to informed Operations Manager for the Department of Public Works, Mr. Joseph P. Letteri, of the new restrictions placed on the use of the plaintiff's right hand/arm under *repetitive task*, which forbade any (lifting, gripping, pulling, pushing, grasping, fine manipulation or depressing, with the right hand/arm). Both documents were presented to the Petitioner on March 21, 2003 by Mr. Joseph P. Letteri as directed by his supervisor Mr. Ellis Henderson for the City of Richmond, Department of Public Works. The Petitioner had never seen these FCE or medical restrictions documents from the City of Richmond's approved treating Doctor before this time. The Petitioner was directed under the threat of "disciplinary action" to perform certain task, Joseph P. Letteri for the City of Richmond, presented the two (2) reports from Doctor Charles H. Bonner and informed the Petitioner under "reasonable accommodations" on Friday March 21, 2003, starting Monday March 24, 2003 he would be required to perform specific duties which included raising the "U.S. flag daily", based on Doctor Charles H. Bonner's report of January 27, 2003, (the task involved raising 4 flags at Richmond's City Hall). Although a new report of February 4, 2003 restricted and banned under "repetitive task" any gripping, pulling, pushing, grasping or depressing, with the right hand/arm of the Petitioner - the Petitioner was informed in writing by Mr. Joseph P. Letteri if he did not perform these tasks, it would be *"considered insubordination subject to disciplinary actions."*

The Petitioner argued verbally on March 21, 2003 and in a letter dated March 24, 2003, this would be against the written orders of Doctor Charles H. Bonner issued on February 4, 2003 which restricted the Petitioner from any lifting, gripping, pulling, pushing, grasping, fine manipulation or depressing, with the right hand/arm, which would be involved and necessary to raise the flags. Mr. Letteri wrote in a letter dated March 26, 2003 to the Petitioner, "These tasks require little physical exertion and I do not believe that they have a sufficient frequency to be classified as repetitive." This statement and Mr. Letteri's actions clearly showed the City's reckless disregard for Doctor Bonner's recommendations and the health and safety of the Petitioner, resulting in two (2) injuries to the Petitioner. Mr. Letteri has sworn in an Affidavit in the Court record that he was aware of the medical restrictions placed on the Petitioner on February 4, 2003. The Petitioner was consequently injured on March 31, 2003 and April 3, 2003 raising flags at Richmond's City Hall. At this point the Respondent had clearly committed gross negligence and violated the Americans with Disabilities Act of 1990 (ADA).

The Petitioner immediately started treatment with Doctor Charles H. Bonner for the injuries on the next visit. The Petitioner informed treating physician Doctor Charles Bonner's office on March 25, 2003, Mr. Joseph Letteri was forcing him to work against restrictions by requiring the duty of raising four outside flags daily which would required the use of the right hand /arm based on the Doctor's January 27, 2003 report and would he change it. The Petitioner's reporting of the breech of restrictions was recorded by Doctor Bonner's office on March 25, 2003 with a written recommendation for "*a review*" from Doctor Charles H. Bonner and stated, "*He has been given an ultimatum by his workplace that he must perform certain job functions*". The review was never carried through by Doctor Bonner. At this point the Doctor Charles H. Bonner had committed negligence. At no time did Doctor Charles H. Bonner intercede, correct, reconsider or transmit another report to

the City removing the raising of the flags from the approved job duties or strongly object to or intervene on the part of the Petitioner to enforce the restrictions, which would have prevented two (2) new injuries, and exacerbate the existing injuries to the Petitioner's, although immediately the Doctor would treat the Petitioner's for the new injuries and make more money. March 31, 2003 and April 3, 2003 are the dates of the new injuries. Due to Doctor Charles H. Bonner's report of January 27, 2003, the Petitioner's was required by Mr. Joseph P. Letteri to ignore the restrictions dated February 4, 2003 and put in-place before the new duties were to began on March 23, 2003 and raised daily four full size flags outdoors until placed on indefinite workmen's compensation leave starting June 2, 2003, due to the permanent nature of the work related injury, at this point the Respondent and the Doctor had clearly committed gross negligence and violated the Americans with Disabilities Act of 1990 (ADA).

On April 22, 2003, the Petitioner in a letter to Mr. Joseph P. Letteri, [the harasser] with copies sent to Mr. Ellis Henderson the Respondent's Director of Operations for Public Works, Kena Christian in Human Resources, and to a representative for the City of Richmond's Risk Management Department, demanded an end to the harassment and for an investigation of the harassment by Mr. Ellis Henderson. The Respondent has admitted in their sworn answer to an interrogatories request, "...the City answers that it is not aware of a properly reported charge of harassment by Plaintiff concerning Mr. Letteri. Consequently, the City is not aware of a responding document." The Respondent never investigated the charge of harassment. The Petitioner argued the City of Richmond did not provide reasonable accomodations, has ignored pleas for an investigation of the harrassment and had commited perjury concerning the reporting of the harrassment which the Court record clearly showed. The motion was denied by the trial Court and the Court of Appeals affirmed. The trial Court felt, if the Doctor had approved the task [regardless of the restrictions] it was a

reasonable accommodation. Perjury was never addressed by the Appeals Court. The Appeals Court did not publish an opinion.

SUMMARY OF ARGUMENT

In Burlington Industries v. Ellerth, 524 U.S. 775 (1998) and Faragher v. City of Boca Raton, 524 U.S. 742 (1998), the Court found that employers have a duty both to prevent [sexual] harassment and to respond to and investigate any complaints. Therefore, employers that do not conduct thorough investigations could be liable for harassment. Zabkowicz v. West Bend Co., 589 F. Supp. 780, 35 EPD ¶ 34,766 (E.D. Wis. 1984), co-workers harassed the plaintiff over a period of nearly four years in a manner the Court described as "malevolent" and "outrageous." Despite the plaintiff's numerous complaints, her supervisor took no remedial action other than to hold occasional meetings at which he reminded employees of the company's policy against offensive conduct. The supervisor never conducted an investigation or disciplined any employees until the plaintiff filed an EEOC charge, at which time one of the offending co-workers was discharged and three others were suspended. The Court held the employer liable because it failed to take immediate and appropriate corrective action.

Proven retaliation frequently constitutes a practice undertaken "with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

The evidence on record clearly shows the respondent openingly and without restraint abused the Petitioner from the onstart of the first injury to the end of the fourth injury, with the Petitioner being placed out of work due to the work related injuries. With the negligence, recklessness and total disregard for the health of the Petitioner, reasonable accomodations was remote on the part of the Respondent. Harrassment on the part of the respondent is

what contributed to the accommodations required by law not to be offered to the Petitioner. The respondent openingly in writing reinterpited restictions placed on the Petitioner by their health care approved Doctor and wilfully forced the Petitioner to perform feats not allowed by the laws of nature with one hand, and knowing the task would requie two, which was restriced, failed to provide reasonable accomlodations.

42 U.S.C. § 12112 (b) (5) (A) (1994) (it is a form of discrimination to fail to provide a reasonable accommodation "unless such covered entity can demonstrate that the accommodation would impose an undue hardship . . .") A modification or adjustment is "reasonable" if it "seems reasonable on its face, i.e., ordinarily or in the run of cases;" this means it is "reasonable" if it appears to be "feasible" or "plausible." An accommodation also must be effective in meeting the needs of the individual. In the context of job performance, this means that a reasonable accommodation enables the individual to perform the essential functions of the position.

After knowing the Petitioner was under restrictions concerning the use of his right hand and arm and being injuried by the task forced on the Petitioner with a threat of "disciplinary actions", the Respondent had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. the Respondent continued to force the Petitioner under the direction of a questionable medical report to perform the repetitive daily duty until placed out of work by the State of Virginia. The Courts have given the Respondent's Doctor too much power in this case and law and common sense did not pervail. The Doctor had actual knowledge that an injury was certain to occur and had occurred and willfully disregarded that knowledge and did not interceded to correct the condition that he had created which was causing the further injuries to the Petitioner hence committing gross negligence towards the Petitioner.

The ruling by the lower Courts in this case has created a loop hole for employers to hide

behind in the treatment of employees in future and simular situations to avoid the intent of ADA law. There was nothing feasible or plausble in the duty directed by the Doctor or Respondent and required of the Petitioner to maintain his employment, daily raising 4 flags with one arm. A medical report or recommendation must have common sense and be clear and not laced with tricky or misleading double speak language attached and must be enforced. The Respondent's defense relies on the approval of task and not the restictions imposed by their approved medical advisor, which is diametrically opposed to the physical nature and laws of physics required to complete the task approved by that same medical advisor. It is foreseeable in the future many more workers will be injured and disabled for life and this Court can prevent that from happening with this case now. The opportunity to right a great wrong is in the hands of this Court.

ARGUMENT

1 . THE PLAIN TEXT OF THE STATUTE MAKES CLEAR THAT " IT IS A FORM OF DISCRIMANATION TO FAIL TO PROVIDE A REASONABLE ACCOMMODATION... "

42 U.S.C. § 12112 (b)(5)(A) (1994) (it is a form of discrimination to fail to provide a reasonable accommodation "unless such covered entity can demonstrate that the accommodation would impose an undue hardship . . ."); see also 42 U.S.C.

In US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516 (2002), the Supreme Court laid out the burdens of proof for an individual with a disability (plaintiff) and an employer (defendant) in an ADA lawsuit alleging failure to provide reasonable accommodation. The "plaintiff/employee (to defeat a defendant/employer's motion for summary judgment) need only show that an 'accommodation' seems reasonable on its face, i.e., ordinarily or in the run of cases." Once the

plaintiff has shown that the accommodation s/he needs is "reasonable," the burden shifts to the defendant/employer to provide case-specific evidence proving that reasonable accommodation would cause an undue hardship in the particular circumstances. A party that fails to raise an affirmative defense as required ... waives the defense. *Travelers Ins Co v Detroit Edison Co*, 237 Mich App 485, 494-495; 603 NW2d 317 (1999).

In this case, the Respondent failed to assert the affirmative defense that reasonable accommodation would cause an undue hardship in the particular circumstances. The Respondent use as a defense a document supplied to the Court record by the Respondent when writing of the Petitioner, "...when asked what duties he could perform, he listed duties that were not a function of this division" This line proves the Petitoner offered alternative duties that were rejected by the Respondent. See Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 678, 7 AD Cas. (BNA)1872, 1881 (7th Cir. 1998) (employer must first identify full range of alternative positions and then determine which ones employee qualified to perform, with or without reasonable accommodation).

Example: A cashier easily becomes fatigued because of lupus and, as a result, has difficulty making it through her shift. The employee requests a stool because sitting greatly reduces the fatigue. This accommodation is reasonable because it is a common-sense solution to remove a workplace barrier being required to stand when the job can be effectively performed sitting down. This "reasonable" accommodation is effective because it addresses the employee's fatigue and enables her to perform her job. In Wood v. County of Alameda, 5 AD Cas. (BNA) 173, 184 (N.D. Cal. 1995) (when employee could no longer perform job because of disability, she was entitled to reassignment to a vacant position, not simply an opportunity to "compete").

Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1522 (2002). The Court explained that "in

ordinary English the word 'reasonable' does not mean 'effective.' It is the word 'accommodation,' not the word 'reasonable,' that conveys the need for effectiveness." Id.

The Respondent did not look outside of their division to find the Petitioner a reasonable job to accommodate the disability and that the defendant had 'actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.

At the time the Petitioner was answering phones, writing reports and inspecting buildings in the midst of other task which were assigned by more immediate Supervisors. The respondent required the Petitioner to perform a task that clearly requires the use of two hands, raising flags. The Petitioner was twice injured performing the task under threat of *"disciplinary actions"* from the harasser Mr. Joseph P. Letteri / Respondent City of Richmond. Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 700, 8 AD Cas. (BNA) 875, 886-87 (7th Cir. 1998) (employer's methodology to determine if reassignment is appropriate does not constitute the "interactive process" contemplated by the ADA if it is directive rather than interactive). Engaging in an interactive process helps employers to discover and provide reasonable accommodation. Moreover, in situations where an employer fails to provide a reasonable accommodation (and undue hardship would not be a valid defense), evidence that the employer engaged in an interactive process can demonstrate a "good faith" effort which can protect an employer from having to pay punitive and certain compensatory damages. See 42 U.S.C. § 1981a(a)(3) (1994).

This Court must ask itself if requiring [what amounts to] a one armed man raising a flag is a reasonable accommodation in this case and if the Respondent acted in an effective interactive way as required by law. The problem is in the absolute power the trial Court and Appeals Court grants the Doctor in this case over the laws of nature and physics. Hypotheticly, if the Doctor approved and the Respondent directed

that the Petitioner fly by flapping his arms, would this be considered a "reasonable accomodation" or an impossible task under any conditions, much in the way an average - if any person - can not raise a flag with one arm with or without accommodations and much less restrictions. The Petitioner never refused to comply with any given task, but in doing so was injuried over and over because of the undoable task offered by the respondent as "reasonable accommodations". The Petitioner is asking this Court to clarify and produce legal guidence to explain the role and practical standards needed in determining the place a medical recommendation and/or restrictions plays in reasonable accommodations. At this point in the law, the rules/law must seem to be a bit fuzzy and not well defined or reasonably understood in a common way in the lower Courts which would express and explain the true intent and spirit of the law. The City of Richmond and the treating Doctor showed willful gross negligence towards the Petitioner. The Supreme Court has said that: "Gross negligence and ordinary negligence differ from one another only in degree, but the species of tortuous conduct which the authorities have variously labeled [sic] willful and wanton conduct, or reckless misconduct, or willful and intentional conduct, differs in kind from both of them." Infant C., 239 Va. at 582, 391 S.E.2d at 328 (citing Kennedy v. McElroy, 195 Va. 1078, 1081, 81 S.E.2d 436, 439 (1954)). For purposes of the statutory exception, however, "gross negligence" is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Id.* Moreover, the Michigan Supreme Court has recently made it clear that liability may be imposed for gross negligence in avoidance of governmental immunity only where the grossly negligent conduct is the proximate cause of injury, i.e., "the *one* most immediate, efficient, and direct cause preceding injury." Robinson v. City of Detroit, 462 Mich. 439, 458-59 (2000).

Willful describes "[a]n intention to do an act that he knows, or ought to know, is wrongful, or forbidden by law. It involves the idea of premeditation and determination to do

the act, though known to be forbidden." Brockway v. Easter, 20 Va. App. 268, 271, 456 S.E.2d 159, 161 (1995), King, 148 Va. at 590-91, 139 S.E. at 479).
42 U.S.C. § 12112 (b) (5) (A) (1994) (it is a form of discrimination to fail to provide a reasonable accommodation "unless such covered entity can demonstrate that the accommodation would impose an undue hardship . . .") A modification or adjustment is "reasonable" if it "seems reasonable on its face, i.e., ordinarily or in the run of cases;" this means it is "reasonable" if it appears to be "feasible" or "plausible." An accommodation also must be effective in meeting the needs of the individual. In the context of job performance, this means that a reasonable accommodation enables the individual to perform the essential functions of the position.

2. THE PLAIN TEXT OF THE STATUTE MAKES CLEAR THAT PERJURY HAS BEEN COMMITED WHEN, "a person, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the U.S. authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or in any declaration, certificate, verification, or statement under penalty of perjury, willfully subscribes as true any material matter which he does not believe to be true;" 18 USC

In this matter, On April 22, 2003, the Petitioner in a letter to a harasser, *Mr. Letteri*, with copies sent to the Petitioner's immediate Supervisor, the harasser's Supervisor, Human Resources, as well as Risk Management, demanded an end to the harassment and for an investigation of the harassment The Petitioner in early March of 2003 had verbally informed his immediate Supervisor of the harassment of Mr. Letteri. The Respondent had replied in their sworn answer to an interrogatories request, dated after the start of Court proceedings and

well after April 22, 2003 and included in the Court record, "...the City answers that it is not aware of a properly reported charge of harassment by Plaintiff concerning Mr. Letteri. Consequently, the City is not aware of a responding document." The respondent knew full and well that all an employee has to do to file a complaint of harassment is inform the immediate Supervisor. This rule is clearly laid out in the City's employee rules and training classes concerning workplace harassment. The actions of the Respondent and their defense should not have prevailed and should not have been ignored or misunderstood by the Appeals Court considering the blatant disregard for the spirit and letter of the law(s) covering workplace harassment, ADA and perjury.

When in the Petitioner's Motion for Summary Judgment it stated "no genuine issue of material facts are at question," he was saying the overwhelming evidence presented by him in this case is so clear and in evidence on record, compared to the weak defense and lack of evidence presented by the Respondent, he should have prevailed at judgment.

CONCLUSION

This Court should vacate the judgment of the Court of Appeals, issue clarifying language in the Court's opinion, and award final judgment to the Petitioner.

Respectfully submitted,

Max Monroe
609 Brook Road
Richmond, Virginia 23220
804/788.8892

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"...a person, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the U.S. authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or in any declaration, certificate, verification, or statement under penalty of perjury, willfully subscribes as true any material matter which he does not believe to be true;" 18 USC

42 U.S.C. § 12112 (b) (5) (A) (1994) (it is a form of discrimination to fail to provide a reasonable accommodation "unless such covered entity can demonstrate that the accommodation would impose an undue hardship . . .") A modification or adjustment is "reasonable" if it "seems reasonable on its face, i.e., ordinarily or in the

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Engaging in an interactive process helps employers to discover and provide reasonable accommodation. Moreover, in situations where an employer fails to provide a reasonable accommodation (and undue hardship would not be a valid defense), evidence that the employer engaged in an interactive process can demonstrate a "good faith" effort which can protect an employer from having to pay punitive and certain compensatory damages. See 42 U.S.C. § 1981a(a)(3) (1994).

In the United States District Court Eastern District of Virginia
1000 East Main Street
Richmond, VA

Case No. 3:03cv914

Max Monroe — Plaintiff
609 Brook Road
Richmond, VA 23220
Vs.
The City of Richmond — Defendant
900 East Broad Street Suite 300
Richmond, VA 23219

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Come Now the plaintiff to ask the Court for Summary Judgment against the defendant, for the subsequent reasons:

1. In the above styled case, there are no unproven facts or unproven genuine issues on the face of the complaint between the plaintiff and defendant, either material or inference. The plaintiff has provided material evidence to support all claims.

2. The defendant admits the defendant issued a memorandum dated March 21, 2003, which directed the plaintiff "under threat," to work against the restrictions imposed by the treating Doctor.

3. The defendant admits a memo dated March 26, 2003 reprimanded the plaintiff and reiterated the task the plaintiff was not to perform under restrictions imposed by the treating Doctor.

4. The defendant has provided no unproven facts or unproven genuine issues as defense to question or disprove their guilt.

5. Plaintiff contends a violation of the plaintiff's Civil Rights. The defendant, the City of Richmond has not complied with and disregarded the Americans with Disabilities Act of 1990 (ADA). By "not reasonably accommodating the plaintiff's disability" which aggravated and caused new injuries – pain and suffering to the plaintiff.

6. Plaintiff contends a violation of the plaintiff's Civil Rights. The defendant, the City of Richmond has not complied with and disregarded the Americans with Disabilities Act of 1990 (ADA). By allowing Mr. Joe Letteri to retaliate against the plaintiff for "asserting his rights under ADA" moreover, becoming a party to the harassment of the plaintiff by failing to address the charge of harassment, which aggravated and caused new injuries – pain and suffering to the plaintiff.

7. Because of the unlawful actions of the defendant, the plaintiff has suffered and will continue to suffer future physical and mental anguish and a loss of future income and interest due to a loss of capacity to labor/loss of earning capacity. The plaintiff preformed heavy labor and enjoyed it for 30 years. The plaintiff is 47 years old. The defendant's placement of the plaintiff on worker's compensation on June 2, 2003 reflects the City of Richmond's (the defendant) acceptance and understanding of the seriousness of the injuries.

8. The plaintiff has suffered a loss of enjoyment of life and will continue to suffer mental anguish because of the loss of enjoyment of life. Recreational and athletic activities will forever be impaired. Recovery is allowed to athletic men for what they suffer in being unable to participate in sports they loved. The plaintiff has always been very athletic. The majority of Courts hold that damages may be awarded for loss of enjoyment in addition to and separate from an award for other elements of damages such as permanent injury or disability, mental and physical pain and suffering, loss of earnings, and loss of capacity to work; and that no double or

overlapping recovery is involved in such an award.

Downie v United States Lines Co. (1966, CA 3 Pa) 359 F2d 334, certden 385 US 897, 17 L. Ed 3d 130, 87 S Ct 201; Scally v W.T. Garratt & Co. (1909) 11 Cal App 138, 104 P 325;Nees v Julian Goldman Stores (1930) 109 W Va 329, 154 SE2d 769; Corcoran v McNeal (1960) 400 Pa 14, 161 A2d 367 (dictum).

The plaintiff is asking the Court for the full relief sort in the complaint.

Respectfully Submitted,

Max Monroe

By: "s/Max Monroe ". Pro se

Max Monroe
609 Brook Road Richmond, VA 23220
Telephone: 804-788-8892

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Max Monroe
Plaintiff

FEB-2-2004
Richmond, VA
"s/Clerk"

v Civil Action Number 3:03CV914

City of Richmond

Received
FEB 03 2004
Office of City Attorney

Defendant

MEMORANDUM OPINION

This Matter comes before the Court on Cross Motion for Summary Judgment. For the reason stated below, the Court DENIES Plaintiff's Motion for Summary Judgment, and GRANTS Defendant's Motion for Summary Judgment.

I.

Pro se Plaintiff Max Monroe ("Plaintiff") has been a custodian for the City of Richmond for the past 30 years. On May, 18, 2001, Plaintiff injured his right arm and hand moving a library table while on duty. The injury was diagnosed as lateral epicondylitis (tennis elbow), and proved difficult to treat. The injury was deemed eligible for works compensation and Plaintiff received treatment from various providers for a year and a half.

After visiting several doctors, Dr. Charles Bonner evaluated Plaintiff and opined that the suffered a 15% permanent partial impairment rating. On January 27, 2003, Anna Davis one of the City's compensation claims administrators, requested that Dr. Bonner indicate which essential functions of the Plaintiff's job description he was capable of performing in light of his permanent partial impairment rating. Dr. Bonner issued a report on February 4, 2003,

explaining that Plaintiff could safely: 1) display the U.S. flag, 2) set up meeting rooms and special events, and 3) replenish restroom supplies and blown light bulbs. Dr. Bonner also indicated that Plaintiff was limited in his ability to use his right hand and arm for repetitive tasks involving manipulation, grasping, gripping, and etc.

Plaintiff's functional capacity limitations were communicated to Joe Letteri, Operations Manager for the department of Public Works. On March 21, 2003, Mr. Letteri informed Plaintiff that he was expected to comply with the restrictions imposed by Dr. Bonner unless he could produce medical documentation indicating he could not perform these tasks. Plaintiff allegedly submitted a memo dated March 24, 2003 stating that he would comply with Dr. Bonner's report but that he believed to do so would result in further injury. On March 26, 2003, Mr. Letteri directed Plaintiff to perform the essential functions of his job exactly as they were indicated by Dr. Bonner's report because he failed to produce alternative documentation.

According to defendant, Plaintiff ultimately refused to perform the three essential functions as outlined by Dr. Bonner's report. In response Mr. Letteri allegedly assigned Plaintiff alternative tasks such as cleaning handrails and doorknobs with disinfectant towlettes. Plaintiff allegedly refused to perform these tasks. According to Defendant, Mr. Letteri again attempted to reassign Plaintiff's job functions and directed him to sit in the lobby of City Hall and look for people entering the lobby through the Padow's delicatessen entrance into City Hall, and to direct them to the security desk. Plaintiff allegedly refused to perform this task as well. On June 2, 2003, Plaintiff was placed on worker' compensation leave.

Plaintiff filed a Motion for Summary Judgment arguing that there are no material facts in dispute and that he is entitled to Judgment as a matter of law. Defendant filed a Cross Motion for Summary Judgment arguing that plaintiff can

prove no set of facts that would entitle him to relief. In that Plaintiff is not entitled to Summary Judgment as a matter of law, his Motion is denied and Defendant's Cross Motion for Summary Judgment is granted.

II.

Under Rule 56(b) of the Federal Rules of Civil Procedure, a court considering a motion for summary judgment must consider the entire record in the light most favorable to the non-moving party. To succeed on a motion for summary judgment, the moving party must demonstrate that no genuine issue of material fact exists and that it is therefore entitled to summary judgment as a matter of law. See Celotex Corp. v Catrett, 477U.S. 317, 322-24 (1986). Rule 56(c) requires the Court to enter summary judgment for the moving party where the non-moving party fails to make a sufficient factual showing on an essential element of the case for which that party has the burden of proff. Celotex, 477 U.S. at 322-23.

A. Plaintiff's Motion for Summary Judgment

Plaintiff moves for summary judgment arguing there are no unproven facts or genuine issues that need to be resolved. Plaintiff alleges that he has provided material evidence to support all claims and that he is entitled to summary judgment. In that Plaintiff can not establish any of his claims, his motion for Summary Judgment must be denied.

Plaintiff argues that he is entitled to judgment because defendant admits to a March 26, 2003 memo which reprimands him for not performing under the restrictions imposed by his treting physician. Plaintiff contends that this action constitutes a violation of the American's with Disabilities Act ("ADA") because Defendant did not provide him with reasonable accommodations, and aggravated his condition by causing new injuries, as well as pain and suffering.

Plaintiff also argues that there are no genuine issues of fact with regards to his unlawful retaliation claim. Plaintiff claims that defendant violated the ADA by allowing his supervisor, Mr. Letteri to retaliate against him for asserting his rights under ADA. Plaintiff also argues that Defendant became a party to the harassment by failing to address it in a timely manner.

Plaintiff argues that he has suffered loss of enjoyment of life and will continue to suffer mental anguish because of his lost. Plaintiff request that the Court grant his Motion for Summary judgment and grant him the full relief sort in his complaint which is 60 Million Dollars ($60,000,000) in compensatory damages and 40 Million Dollars ($40,000,000) in punitive damages.

Plaintiff, however, is unable to establish any of his claims as a matter of law. Plaintiff is not entitled to summary judgment on his failure to accommodate claim, because Defendant provided every reasonable accommodation that Plaintiff was entitled to. Plaintiff can not establish his retaliation claim, because Plaintiff can not establish all of the essential elements of any of his claims, his Motion for Summary Judgment must be denied.

B. Defendant's Cross Motion for Summary Judgment.

1. Plaintiff can not establish his failure to accommodate claim.

Plaintiff brings a claim against Defendant for failure to accommodate his disability ADA prohibits discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the firing, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Under the ADA, discrimination

occurs when an employer refuses to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant employee. "42 U.S.C. § 12112(5)(A).

The Fourth Circuit has explained that to establish a prima facie case of failure to accommodate a disability, a Plaintiff must show "(1) that he was an individual who had a disability within the meaning of the statue; (2) that the employer had notice of his disability; (3) that with reasonable accommodation he could perform the essential functions of the position....; and (4) that the [employer] refused to make such accommodations." Rhoads v. FDIC, 257 F 3d 373, 387 n. 11 (4th Cir. 2001). In that Plaintiff can not establish that Defendant refused to make reasonable accommodations, defendant is entitled to summary judgment as to Plaintiff's failure to accommodate claim.

a. Whether Plaintiff is an individual with a disability under the ADA.

Under the ADA, the term "'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires." 42 U.S.C. § 12111(8). To establish he is an individual with a disability under the ADA, Plaintiff must show that he: (1) suffers from a physical or mental impairment that (2) substantially limits a major life activity. 42 U.S.C. § 12102(2). In Toyota Manufacturing v. Williams. 534 U.S. 184 (2002), the Supreme Court explained that "these terms need to be interpreted strictly," and that "[m]erely having an impairment dose not make one disabled for purposes of the ADA." Id. At 195, 197. The Supreme Court explained that '[c]laimants also need to demonstrate that the impairment limits a major life activity." Id. At 195.

The Court in Toyota explained that "the term 'major life activities' refers to those activities that are of central importance to daily

life." Id. "[T]o be substantially limited in the major life activity pf performing manual task, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." Id at 198. "It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of impairment." Id. Instead, the ADA requires plaintiffs to offer evidence that the extent of the limitation caused by their impairment is substantial in terms of their own experience. Id.

Defendant argues that Plaintiff's 15% partial disability rating does not translate into a physical impairment that substantially limits a major life activity under the ADA. Plaintiff relies upon Dr, Bonner's medical diagnosis and his pleading that his disability has prevented the normal enjoyment of certain activities – namely – fishing, boxing, working out, and care for his daily needs. Defendant argues that Plaintiff has not alleged that a disability has substantially limited a major life activity and he is not therefore disabled under the ADA.

Defendant also argues that Plaintiff is not a "qualified individual" under the ADA. To be a "qualified individual" under the ADA such a "person must be able to meet all of a program's requirements in spite of his handicap." Tyndall v. National Educ. Ctrs., 31 F.3d 209,213 (4th Cir. 1994). According to the Court in Tyndall, to determine whether a plaintiff was qualified for the position, the court must decide: (1) whether the employee could perform the essential functions of the job, i.e., functions that bear more than a marginal relationship to the job at issue, and (2) if not, whether any reasonable accommodation by the employer would enable the employee to perform those functions. Id. at 213.

Defendant argues that Plaintiff either cannot or simply refuses to perform the essential functions of his job as a custodian. The essential functions are defined as "the

fundamental job duties" of a particular position. 29 C.F.R. § 1630.2(n)(1). Dr. Bonner reported that Defendant was capable of performing three essential job functions: (1) raising the flag, (2) setting up meeting rooms and special events, and (3) replenishing restroom supplies and replacing blown light bulbs. Defendant argues that Plaintiff has unequivocally stated that he can not perform the essential functions described on his job description and refuses to perform those duties that his treating physician reports that he is capable of performing. According to Defendant, Plaintiff claims that performing these duties has caused new injuries.

Plaintiff argues that he never refused to perform any tasks given to him. Plaintiff reports that this allegation is false and that the only person who has made such an allegation is Mr. Letteri, the person who Plaintiff has accused of harassing him. Plaintiff further alleges that if he would have refused to perform his job tasks, then he would have been reprimanded for "dereliction of duty." Plaintiff argues that no such form has ever been produced and that he never refused to perform any tasks.

It is questionable whether Plaintiff is a qualified individual with a disability under the ADA. For the sake of the current Motion, the Court will assume that Plaintiff is disabled under the ADA. Plaintiff is still, however, unable to establish the Defendant failed to make reasonable accommodations, nor can Plaintiff establish his retaliation claim or his disability harassment claim.

b. Plaintiff can not prove that Defendant failed to make accommodations.

Defendant made every effort to accommodate the demands of Plaintiff's impairment. The employer has "the ultimate discretion" in determining what the accommodation should be and the test as whether it is reasonable or not is an objective

one. Williams v. Channel Master Satellite Sys. Inc., 101 F.3d 346, 350 (4th Cir. 1996).

Upon receiving Dr. Bonner's evaluation, Defendant immediately reduced Plaintiff's job duties. Plaintiff's duties were limited to those functions which his treating physician Dr. Bonner stated he was capable of performing. Plaintiff argues that these accommodations were unreasonable because Dr. Bonner's evaluation was inconsistent and should have therefore been rejected by Defendant. The responsibility to prove that Plaintiff could not in fact perform the functions listed by his Physician rested solely with Plaintiff himself. See McAlpin v. National Semiconductor Corp., 921 F. Supp. 1518, 1525 (N.D. Tex. 1996) (explaining that when an employee challenges a doctor's assessment of his or her ability to perform certain job functions, it is the employee's responsibility to gather clarifying evidence from his or her physician). Defendant was reasonable in relying on the evaluation submitted by Plaintiff's treating Physician and therefore made reasonable accommodations to compensate for Plaintiff's impairment.

Furthermore, Defendant allegedly made additional accommodations, after Plaintiff complained of being unable to perform the listed functions. Defendant altered Plaintiff's job duties to include disinfecting handrails and doorknobs and sitting in one location, all in an effort to accommodate Plaintiff's impairment. Defendant has provided Plaintiff with every accommodation he was entitled to under the ADA and more. Plaintiff can not, therefore establish the necessary element of Defendant's failure to make reasonable accommodations. In that Plaintiff can not establish an essential element of his failure to accommodate claim, Defendant is therefore entitled to summary judgment as a matter of law.

2. Plaintiff can not establish a retaliation claim under the ADA

Plaintiff contends that Mr. Letter's March 21 and March 26 memos constituted an act of retaliation in violation of the ADA. The ADA provides that "[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act." 42 U.S.C. § 12203(a). Consequently, courts have applied Title VII retaliation claim analysis to evaluate claims brought pursuant to the ADA Fox v. Gen. Motors Corp., 247 F.3d 169, 176 (4th Cir. 2001). In order to prevail on a claim of retaliation, a plaintiff must either offer sufficient direct and indirect evidence of retaliation, or proceed under a burden-shifting method. See Brinkley v. Harbour Recreation Club, 180 F.3d 598, 606-07 (4th Cir. 1999). Plaintiff has not provided direct evidence of retaliation and must therefore use the burden–shifting method to establish hi claim.

Under the burden-shifting method of proof, to establish a prima facie case of retaliation, a plaintiff must show that: (1) he engaged in a protected activity; (2) his employer acted adversely against him; and (3) his protected activity was causally connected to the employer's adverse action. See Haulbrook v. Michelin N. Am., Inc., 252 F.3d 696 (4th Cir. 2001). The employer than has the burden "to rebut the presumption of retaliation by articulating a legitimate non-retaliatory reason for its actions." Beall v. Abbott Labs., 130 F.3d 614, 619 (4th Cir. 1997). Once the employer comes forward with a legitimate reason to explain its decision, the burden shifts back to the Plaintiff to show that the articulated reason is pretextual. McDonnell Douglas Corp. V. Green, 411 U.S. 792, 802 (1973). The Plaintiff always bears the ultimate burden of persuading the trier of fact that he was the victim of retaliation. See " Beall, 130 F.3d at 619.

Defendant argues that Plaintiff is unable to establish a prima facie case of retaliation.

Defendant argues that Plaintiff has demonstrated no facts showing that he engaged in protected activity or that he suffered adverse action. Defendant argues that Plaintiff has failed to make a claim for retaliation as a matter of law. It is questionable whether Plaintiff can establish a prima facie case of retaliation, but assuming Plaintiff can, Defendant has established a legitimate non-retaliatory reason for its actions and Plaintiff has no evidence to establish that he stated reason is pretextual.

As stated before, Plaintiff relies on Mr. Letteri's March 21 and March 26 memos to support his retaliation claim. The memos, however, clearly establish that Plaintiff was reprimanded for failing to perform the essential job functions which his physician said he could perform. The memos simply request that Plaintiff comply with the limitations imposed by this treating physician's report or provide medical documentation to the contrary. Plaintiff failed to provide additional medical documentation and Defendant therefore acted within the constraints of the ADA. In that Plaintiff has no other viable evidence, besides the two March memos, to support his retaliation claim, his claim fails as a matter of law.

3. Plaintiff can not establish a claim for disability harassment.

Plaintiff's final claim is that Defendant harassed him because of his alleged disability. To make out a claim of disability harassment, Plaintiff must show that the acts of Defendant's employees were severe and pervasive enough to create a hostile working environment, and that some basis exists to impute liability to the employer. See Amirmokri v. Baltimore Gas and Electric Co., 60 F.3d 1126, 1130 (4th Cir. 1995). (discussing national origin harassment); Dwyer v. Smith, 867 F.2d 184, 187 (4th Cir. 1989) (discussing sexual harassment). Although the question whether harassment is sufficiently severe or pervasive is quintessentially a question of fact, Beardsley v. Webb, 30 F.3d 524, 530 (4th Cir. 1994), where the conduct is nether

sufficiently severe nor pervasive to create an environment that a reasonable person would find hostile or abusive, summary judgment is appropriate. See Hopkins v. Baltimore Gas and Electric Co., 77 F.3d 745, 753 (4th Cir. 1996).

Plaintiff again relies on the March 21 and March 26 memos from Mr. Letteri to support his disability harassment claim. Plaintiff alleges that Mr. Letteri's memos directing him to perform the job functions listed by Dr. Bonner constitute harassment on the basis of disability. However, there is nothing in the memos that a reasonable person would consider severe, pervasive, hostile or abusive. Plaintiff also argues that Mr. Lettri, was the only person who reprimanded him, and not his immediate supervisor. The fact that Mr. Letteri was the only person who sent the letters of reprimand is also sufficient to establish a severe, pervasive, hostile, or abusive environment.

Plaintiff is unable to establish that Defendant's conduct was severe and pervasive enough to create an environment that a reasonable person would find hostile or abusive. Likewise, Plaintiff is unable to establish a prima facie case of disability harassment and Defendant is therefore entitled to Summary Judgment.

For the reasons previously stated, Plaintiff's Motion for Summary Judgment is DENIED and Defendant's Motion for Summary Judgment is herby GRANTED.

James R. Spencer
(s)/James R. Spencer

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INFORMAL BRIEF

RE:
Max Monroe
04-1221
v
City of Richmond

Directions

1. Preparation of Brief. The Court will consider this appeal according to the written issues, facts, and arguments Appellant presents in the Informal Brief. Space is provided to present up to four issues. You may present more than four issues if you think such is necessary. The Court will not consider issues Appellant does not specifically raise. Be brief. Write clearly. Print legibly or use a typewriter. Any documents you attach to the form must be numbered sequentially.

2. Copies required.

* Send the Court the original and one copy of your Informal Brief. Address your mailing as follows:

Clerk
U.S. Court of Appeals, Fourth Circuit
U.S. Courthouse Annex, 5th Floor
1100 East Main Street
Richmond, VA 23219

* Send one copy of your Informal Brief to each of the parties named in the appeal.

If you would like a file-stamped copy of your brief returned to you, send an extra copy and a self-addressed stamped envelope.

3. Certificate of Service Required. You must certify that you sent each of the other parties or attorneys complete copies of all documents you send the Court. Service on a party represented by counsel shall be made on counsel. Be certain that your certification shows the complete name and mailing address of each party or attorney to whom copies were sent and the date of mailing.

4. Signature Required. You must sign your Informal Brief and all Certificates of Service. If Appellant fails to sign the Informal Brief, the appeal will be subject to dismissal under this Court's Local Rule 45

INFORMAL BRIEF

RE:

Max Monroe Appellant
Vs.
City of Richmond Appellee

1. Jurisdiction (for Appellants only)

A. What is the name of the court from which you are appealing?

United States District Court Eastern District of Virginia

B. What is the date(s) of the order or orders you are appealing?

February 2, 2004

2. Timeliness of appeal (for prisoners only)
When did you give your notice of appeal to a prison officer for mailing to the United States District Court? Enter the exact date:

3. Issues on Appeal
Use the following spaces to tell the United States Court of Appeals for the Fourth Circuit why the judgment under review should be affirmed, reversed, or vacated and remanded.
Appellants must provide a brief summary of the facts and arguments that support their position that the judgment under review was wrong. Appellee's may rely on the facts and law stated in that judgment or may advance alternative grounds for affirmance or dismissal. The parties may cite case law, but it is not required.

Issue 1.

Late Filing of the Appellee's Motion for Summary Judgment.
On January 29, 2004 the United States District Court Eastern District of Virginia
Erred by allowing the Appellee's Motion for Summary Judgment to be heard and Granted Summary Judgment.

Supporting Facts and Argument.

Under fed rule 7 [E] [1] ...the opposing party shall file a responsive brief and such supporting documents as are appropriate, within eleven (11) days after service... The Appellee and Court were served on Monday December 1, 2003. The Appellant received their reply copy on Wednesday December 17, 2003 of the Appellee's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment (dated December 15, 2003) and their (corrected version) (dated December 16, 2003). The Appellee is in default of rule 7 [E] [1]. The Appellant argued the point in their reply. Rule 56(c) requires the Court to enter summary judgment for the moving party where the non-moving party fails to make a sufficient factual showing on an essential element of the case for which that party has the burden of proof. Celotex, 477 U.S. at 322-23. (Pages 1-2).

Issue 2.
Unreasonable Accommodation.
The Court erred in not using common standards of reason and sense, in not realizing Doctor Bonner did not exercise "reasonable judgment" in creating a contradictory report issued on January 27, February 4, 2003, or by the Appellee for using the report to which the Appellant was to perform under "reasonable accommodations." This report became the basis of the Appellant's charge of not being given "reasonable accommodations."

Supporting Facts and Argument.

The Court states in its Memorandum Opinion page 2, "a report issued by Doctor Bonner on February 4, 2003 explained that plaintiff could [safely] perform duties such as display the (2) U.S., (2) State flags, etc, (page 3) but on the second page (page 4) under repetitive tasks, the report states, 'right hand, no grasping, no gripping, no pulling, etc.". The Court must decide is it reasonable to think, the recommended accommodations were reasonable and if strictly conforming to the restrictions imposed by the Doctor's report what might be the results. The court must decide could the average person assigned such a job duty, injured or fit, raise (4) flags daily with one hand and what might be the results. The Appellant of course used two hands to perform this task. The Court must decide what is the actually meaning of the words, "no gripping, no pulling, etc." in the imposed restrictions of the treating Doctor. The tasks given the Appellant under the alleged reasonable accommodations are the only three tasks offered to the Doctor for consideration from the long list of other less laborious tasks in the Appellant's job description. This task is physically impossible and not feasible or plausible given the restrictions. The Appellant had provided the Appellee with a list of "reasonable accommodations" in light of his disabilities. In US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516 (2002), the Supreme Court laid out the burdens of proof for an individual with a disability (plaintiff) and an employer (defendant) in an ADA lawsuit alleging failure to provide reasonable accommodation. The "plaintiff/employee (to defeat a defendant/employer's motion for summary judgment) need only show that an 'accommodation' seems reasonable on its face, i.e., ordinarily or in the run of cases". Once the plaintiff has shown that the accommodation s/he needs is "reasonable," the burden shifts to the defendant/employer to provide case-specific evidence proving that reasonable

accommodation would cause an undue hardship in the particular circumstances. See Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 678, 7 AD Cas. (BNA)1872, 1881 (7th Cir. 1998) (employer must first identify full range of alternative positions and then determine which ones employee qualified to perform, with or without reasonable accommodation); The Appellee's decision to use this medical report as its basis for providing "reasonable accommodations" having pre-knowledge of the Appellant's condition, medical history on file, and the common knowledge of the laws of physics, the "accommodations" given the Appellant by the Appellee are not reasonable [or rational or accommadating] on its face. A modification or adjustment is "reasonable" if it "seems reasonable on its face, i.e., ordinarily or in the run of cases;" this means it is "reasonable" if it appears to be "feasible" or "plausible." An accommodation also must be effective in meeting the needs of the individual. In the context of job performance, this means that a reasonable accommodation enables the individual to perform the essential functions of the position. See 42 U.S.C. § 12112 (b)(5)(A) (1994) (Pages 3-4).

The Court should have found this an unreasonable accomodation. The Appellant argues this is an unreasonable accomodation.

Issue 3.

Unreasonable Accommodations and Coertion by the Appellee

The Court erred in not realizing the Appellant was forced to comply with an unreasonable by common sense and undoable under the laws of physics, job duty (accommodation) of rising (4) flags with one hand [This duty which until March 24, 2003, was performed by the buildings Guard Staff and Maintenance Crew, not the Custodial staff at City Hall] per the contradictory report from Doctor Charles Bonner and coercive

actions of the Appellee, which the Appellee had an option to modify, clarify or ignore.

Supporting Facts and Argument.

Mr. Letteri's letter of March 21, 2003 had included the statement, "Please note that you will continue to be evaluated on your performance of these duties and that failure to perform these tasks will be considered at a minimum an act of insubordination subject to disciplinary action." Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 700, 8 AD Cas. (BNA) 875, 886-87 (7th Cir. 1998) (employer's methodology to determine if reassignment is appropriate does not constitute the "interactive process" contemplated by the ADA if it is directive rather than interactive); the Appellee chose the "directive process" rather than the "interactive process" in determining "reasonable accommodations". A modification or adjustment is "reasonable" if it "seems reasonable on its face, i.e., ordinarily or in the run of cases;" this means it is "reasonable" if it appears to be "feasible" or "plausible." An accommodation also must be effective in meeting the needs of the individual. In the context of job performance, this means that a reasonable accommodation enables the individual to perform the essential functions of the position. See 42 U.S.C. § 12112 (b)(5)(A) (1994) (it is a form of discrimination to fail to provide a reasonable accommodation "unless such covered entity can demonstrate that the accommodation would impose an undue hardship . . ."); see also 42 U.S.C. The Supreme Court's burden-shifting framework does not affect the interactive process triggered by an individual's request for accommodation. An employer should still engage in this informal dialogue to obtain relevant information needed to make an informed decision. The Appellant was being forced by corertion into performing what can only be discribed as a circus trick and continued to raise the buildings flags until he was placed by the State of Virginia on Workmen's Compensation Leave on June 2,

2003. The Court needs to reasonably decide if the Appellee's actions meet the standard of coercion against the Appellant. General Moters v. Belvins, D.C. Colo., 144 F.Supp. 381, 384. Garrity v. State of N.J. U.S.N.J., 385 U.S. 493, 87 S.Ct. 616, 618, 17,Led.2d 562 (Page 5).

The Court should have found this an unreasonable accomodation carried out through intimidation and/or coercion by the Appellee. The Appellant argues the Appellee did not offer reasonable accommodations.

Issue 4.
Unreasonable Accommodations Harassment and Retaliation
The Court erred when not finding the Appellant had in fact provided sufficient documentation to show the existence of an ADA disability nor was permitted sufficient time to provide an opposing second FCE before beginning duties.
Supporting Facts and Argument

The Appellant provided the Appellee with a report from the Appellant's independent Doctor Lloyd A. Bonner M.D. dated December 10, 2002. The impairment's impact was deemed permanent. Mr. Letteri informed the Appellant on March 21, 2003, the City would be using the City's Health Management approved Doctor's FCE results from Doctor Charles Bonner and not the Appellant's Doctor's report. Under the threat of "disciplinary action" stated in Mr. Letteri's letter, (page 6), the Appellant was to start these new tasks on Monday morning. From Friday, March 21, 2003, with the workday ending at 3:30 pm, and the Appellant expected to start performing the duties at 7:00 am, Monday morning, is it reasonable to expect the Appellant would have been able to schedule, test and receive a new FCE in the span of 63.5 hours over a weekend? If an individual provides sufficient documentation to show the existence of an ADA disability and the need for reasonable accommodation, continued efforts by the

employer to require that the individual see the employer's health professional could be considered retaliation [and a conflict of interest]. ADA. See 29 C.F.R. § 1630.1(c)(2) (1997). Notably the EEOC stated that an employer is limited in the ability to question the employee's documentation of a disability ("An employer cannot ask for documentation when: (1) both the disability and the need for reasonable accommodation are obvious, or (2) the individual has already provided the employer with sufficient information to substantiate that s/ he has an ADA disability and needs the reasonable accommodation requested."). The Appellee's Health Management Company would later block payment for recommended MRI exams requested by both the Appellant's personal and Health Management Company's treating Doctors, which could have lead to a new FCE. The appellate was denied services at the Appellee's designated employee medical services facility for accident related evaluations even after offering to pay for the services himself. The Court please must note the timing of the events. On March 20, 2003, the State of Virginia informed the Appellant and Appellee the Appellant was awarded permanent partial disability benefits. On March 21, 2003 the Appellee confronts the Appellant with the Appellee's Health Management Company's recommened duties list and the Health Management Company's approved physician's FCE report which was dated January 27 and Febuary 4, 2003 respectively. The Court must wonder and consider, where was this report for fourty-five (45) days and why did the Appellee not use it until March 21, 2003 and why the Appellent was not offered "reasonable accomondations" until this date. The Appellent was first injured on May 18, 2001.

The Appellant feels the Appellee was harrassing and retailating against the Appellant for being awarded by the State for his injury. This event is well within the timeline of harrassing events recorded by the Appellant and in the trial record of evidence. (Plaintiff's Exhibit 8). The Appellant

at the time was performing other duites assigned by a more immediate supervisor. The chain of command is as follows; Coustodian (Appellent), Crew Chief, Supervisor, Labor and Trades Supervisor, Superintendent, Operations Manager Mr. Joe Letteri (Appellee). Mr. Letteri became the Appellant's immediate Supervisor inasmuch as the Appellant was interacting and taking orders directly from him. No other parties of simular injury were under his heightened scrutiny, as was the Appellant. "A charging party who alleges retaliation in violation of the ADA need not be a qualified individual with a disability\7". (Quoting EEOC DIRECTIVE Number 915.003) "The most common method of proving that retaliation was the reason for an adverse action is through circumstantial evidence. Typically, pretext is proved through evidence that the respondent treated the complainant differently from similarly situated employees or that the respondent's explanation for the adverse action is not believable. Pretext can also be shown if the respondent subjected the charging party's work performance to heightened scrutiny after she engaged in protected activity\52..." A violation is established if there is circumstantial evidence raising an inference of retaliation and if the respondent fails to produce evidence of alegitimate, non-retaliatory reason for the challenged action, or if the reason advanced by the respondent is a pretext to hide the retaliatory motive. (Page 5).

Issue 5.

Appellant's Alleged Refusal to Perform Essential Functions and Coercion, Retaliation and Harassment.

The Court erred in not realizing the Appellant's testimony of performing all asked for tasks are true and that the Appellee's defense of the Appellant's refusal to perform assigned duties is unsupported by evidence and a blatant lie as a cover up for retaliation, harassment and coercion.

Supporting Facts and Argument.

The Appellee has provided no evidence to support their claim the Appellant refused to comply with the duty orders given to him. In fact, the Appellee admits the Appellant agreed in writing to comply, but expressed concern for his future health and safety. The list of duties supplied into evidence by the Appellee but allegedly rejected by the Appellant were in fact duties carried out by the Appellant until the frequent shifting of duties by Mr. Letteri himself (page 9). In fact, the Appellant was required to raise the flags along with sitting at the door in the lobby (performing a duty now carried out by a metal detector and an armed Deputy Sheriff) until the last days of work before going out on Workmen's Compensation Leave on June 2, 2003. This is how the Appellant sustained two new injuries, March 31 and April 3, 2003. In the Court's Memorandum Opinion page 10, the Court referring to the memos of Mr. Letteri March 21 and March 26, "The memos, however, clearly establishes that the Appellant was reprimanded for failing to perform the essential job functions which his physicians said he could perform." The Appellant, with all due respect, questions the Court's reading and comprehension of the facts in these memos. The memo of March 21, 2003 only assigns duties to the Appellant and the memo of March 26, 2003 states the Appellee's false charge that the Appellant made threats to Mr. Letteri and that is why the Appellant was being reprimanded. The cause for this reprimand "verbal threat" is not sworn to in any Affidavit by the Appellee, the Appellee understands to do so would be perjury; the true reason was harassment and retaliation for questioning the duties given by the Appellee. So asserts the Appellant. The Appellant made no threats to the Appellee. However, the Appellant was accused of a crime under state and federal laws and a false reprimand placed in his permanent file. There is no mention in either memo inferred or implied, of any charge of the Appellant not performing any job duties. In fact,

these memos prove the Appellant exerted his rights under ADA questioning the common sense of the duties in his letter to Mr. Letteri dated, March 24, 2003 (page 6), after which the Appellant was reprimanded (March 26, 2003) on false charges (page 7). The Appellant was attempting to engage in informal dialogue with the Appellee over reasonable accommodations. Doctor Charles Bonner had written under repetitive tasks for the right hand, "no gripping and no pulling etc." The Appellee going on in his letter makes the following statement referring to the job duties (page 8) "...I do not believe that they have a sufficient frequency to be classified as repetitive." Mr. Letteri over-rode and modified the restrictions placed on the Appellant by the very Doctor they are looking to for guidance. The Appellee wants their cake and eat it too. Mr. Letteri had no right to change the Doctor's meaning in the restrictions. 37 42 U.S.C. §1211(8). The EEOC has stated that a function may be essential because (1) the position exists to perform the duty, (2) there are a limited number of employees available who could perform the function, or (3) the function is highly specialized. The Appellant was given the duty to raise four (4) flags. The Appellant was not the only person with the knowledge to raise flags. The building's security and building maintenance staff, not the cleaning staff, performed this duty for over 30 years, although it is on the cleaning staff's job duties list. The Court must also note the date on the letter from Mr. Letteri (Page 9) in which Mr. Letteri states "Mr. Monroe refused to do or complained about doing the above tasks ..." Which tasks does the Appellee claim the Appellant refused and which were complained about? A complaint is not a refusal and the Appellee's claim of refusals of duties by the Appellant is a willful lie contrary to the evidence. The Court must consider why this document was generated on July 28, 2003; 56 days after the Appellant had been placed on Workmen's Compensation Leave beginning June 2, 2003. Mr. Letteri continues and writes, "...when asked what duties he could perform, he

listed duties that were not a function of this division". This line proves the Appellant offered alternative duties that were rejected by the Appellee. See Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 678, 7 AD Cas. (BNA)1872, 1881 (7th Cir. 1998) (employer must first identify full range of alternative positions and then determine which ones employee qualified to perform, with or without reasonable accommodation). The Appellee did not look outside of their division to find the Appellant a reasonable job to accommodate the disability. This Letter along with the letter from March 26 (page 7), was the start of the Appellee's cover up of the true events. This document is from the hand of the accused harasser Mr. Joe Letteri. This was a discriminatory practice engaged in with malice or with reckless indifference to the rights of the aggrieved individual, which lead to the Appellant, being injured twice more. The court must consider the chain of events. The court must decide if Mr. Letteri had the right to modify the Doctor's restrictions and if doing so was a reasonable accommodation or harassment and retaliation with reckless indifference to the rights of the aggrieved individual. (Pages 6, 7, 8 and 9).

Issue 6.

The Appellant Working Under An Unreasonable Accommodation After providing Evidence of Needing an Accommodation Has Violated the Law.

Supporting Facts and Argument.

If the Appellant was forced to work for even one day under an unreasonable accommodation, the law has been violated. The Appellant provided the Appellee with a report from the Appellant's independent Doctor, Lloyd A. Bonner M.D. dated December 10, 2002. The impairment's impact was deemed permanent. The Appellee admits they [allegedly] offered "accommodations" on March 21, 2003 (99 days later). Cf. Masterson v. Yellow Freight Sys., Inc., Nos. 98-6126, 98-

6025, 1998 WL 856143 (10th Cir. Dec. 11, 1998) (fact that an employee with a disability does not need a reasonable accommodation all the time does not relieve employer from providing an accommodation for the period when he does need one).

Issue 7.
The Appellant As A Qualified Individual With A Disability.

Supporting Facts and Argument.

The Court erred in not realizing, if the Appellee's plead that they gave the Appellant "reasonable accommodations" after receiving health reports and restrictions from their approved Doctors, they have admitted they considered the Appellant a Qualified Individual With A Disability and proceeded under this arrangement. The definitions in the ADA, particularly the definition of "disability," are the starting point for an analysis of rights provided by the law. The term "disability," with respect to an individual, is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." ADA section 504. 8." The Court in *Sutton* and *Murphy* also observed that the third prong of the ADA's definition of disability, which would include individuals, who are "regarded as" having a disability is relevant. The Court found that there are two ways an individual could be "regarded as" having a disability: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, non limiting impairment substantially limits one or more major life activities. Working at full capacity or being allowed to work period, with or without a disability, is considered a major life activity. The Appellant was informed in 2003 by

the City of Richmond and the State of Virginia; he would be placed on Workmen's Compensation Leave as of June 2, 2003 due to his injury on May 18, 2001. The Supreme Court found that the term "major life activity" "refers to those activities that are of central importance to daily life." "Significantly, the Court also stated that "[t] he impairment's impact must also be permanent or long-term." The Supreme Court's opinion emphasized the need for an individualized assessment of the effect of the impairment. The Appellant has placed in the Court record, statements as to personal limitations in function and abilities and an Affidavit from Ms. Renae Moody. (Pages 10-11). The Appellant argues he Qualifies under ADA.

Issue 8.
Failure to Address the Appellant's Charge of Harassment, Fraud and Perjury on the Part of the Appellee.

Supporting Facts and Argument.

On April 22, 2003, the Appellant in a letter to Mr. Letteri, with copies sent to Mr. Ellis Henderson the Appellee's Director and Kena Christian in Human Resources, demanded an end to the harassment and for an investigation of the harassment by Mr. Henderson (page 12). The Appellee has admitted in their sworn answer to an interrogatories request, number 7, (page 13) "...the City answers that it is not aware of a properly reported charge of harassment by Plaintiff concerning Mr. Letteri. Consequently, the City is not aware of a responding document." This proves beyond a doubt, the Appellee never investigated the charge of harassment, which would make them liable for harassment themselves and proves willful perjury on the part of the Appellee by swearing under oath that they never received notice of harassment. If the Court finds the Appellee has committed perjury, all of their evidence and pleadings should be viewed

as stained. Fraud is an intentional perversion of truth; deceitful practice or device resorted to with intent to deprive another of property or other right or in some manner do him/her injury. Henry v. Deen, 310 N.C. 75, 310 S.E. 2d, 326, 335. 18 USC.
In Burlington Industries v. Ellerth, 524 U.S. 775 (1998) and Faragher v. City of Boca Raton, 524 U.S. 742 (1998), the Court found that employers have a duty both to prevent [sexual] harassment and to respond to and investigate any complaints. Therefore, employers that do not conduct thorough investigations could be liable for harassment. Proven retaliation frequently constitutes a practice undertaken "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." The Appellant argues the Appellee's harassment as outlined in Court records (including the appellent's time-line of harassment) is sufficiently severe and pervasive enough to be considerd circumstantial evidence for harassment to create an enviroment that a reasonable person would find hostile and abusive. Foster v. Union Strarch & Refining Co., 11 Ill. App.2d 346, 137 N.E.2d 499, 502. Twin City Fire Ins. Co. v. Lonas, 255 Ky. 717, 75 S.W.2d 348, 350. Although the question whether harassment is sufficiently severe or pervasive is quintessentially a question of fact. Beardsley v Wedd, 30 F 3d. 524.530 (4th Cir. 1994). (Pages 12-13).

4. Relief Requested

What do you want the Court of Appeals to do? Identify exactly the relief you seek.

The Appellant is asking the Court to vacate the judgment given the Appellee on their Motion for Summary Judgment and remand this case back to the United States District Court Eastern

District of Virginia for a trial by jury. If this Court finds the Appellee has committed perjury and/or fraud, the Court should award the Appellant the relief asked for in the complaint, $100,000,000 dollars.

5. Prior appeals (for Appellants only)

A. Have you filed other appeals in this court?
Yes No □ X

B. If you checked YES, what are the case names and docket numbers for those appeals and what was the ultimate disposition of each?

_____
Signature
[Notarization Not Required]

Max Monroe
[Please Print Your Name Here]

CERTIFICATE OF SERVICE
****

I certify that on _____ I mailed a complete copy of this Informal Brief and all attachments to all parties, addressed as shown below.

_____

Signature
[Notarization Not Required]

[List here each party's name and complete mailing address]

Stephen M. Barnett Attorney for the Appellee (City of Richmond)
900 East Broad Street Suite 300
Richmond, VA 23219

UNITED STATES DISTRICT JUDGE

Feb 02 2004
DATE

JUDGEMENT
FILED: August 17, 2004

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

NO. 04-1221
CA-03-914-3

MAX MONROE
Plaintiff – Appellant
v.
CITY OF RICHMOND
Defendant – Appellee

Appeal from the United States District Court for the Eastern District of Virginia at Richmond

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In accordance with the written opinion of this Court filed this day; the Court affirms the judgment of the District Court.

A Certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Conner

CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-1221

MAX MONROE,

Plaintiff – Appellant,

Versus

CITY OF RICHMOND,

Defendant – Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. James R. Spencer, District Judge (CA-03-914-3)

Submitted: August 12, 2004 Decided: August 17, 2004

Before NIEMEYER, WILLIAMS, and TRAXLER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Max Monroe, Appellant Pro Se, Stephen Michael Barnett, CITY ATTORNEY'S OFFICE, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

PER CURIAM:

Max Monroe appeals the district court's order denying relief on his civil action alleging violations of the American with Disabilities Act. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. See Monroe v. City of Richmond, No. CA-03-914-3 (E.D. Va. Feb 2, 2004). We dispense with oral argument because the facts and legal

contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURT COURT

Filed
September 21, 2004

No. 04-1221
CA-03-914-3

MAX MONROE

Plaintiff – Appellant

v.

CITY OF RICHMOND

Defendant – Appellee

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel comprised of Judge Williams, Judge Niemeyer, and Judge Traxler.

For the Court,

/s/ Patricia S. Conner

CLERK

NOTICE OF ISSUANCE OF MANDATE

UNITED STATES COURT OF APPEALS
FOR THE FOURT CIRCUIT

September 29, 2004

Mandate

TO: Clerk, District Court/Agency

FROM: Taline Akseraylian
Deputy Clerk

RE: 04-1221 Monroe v. City of Richmond
CA-03-914-3

HEREWITH IS THE MANDATE OF THIS COURT, ISSUED THIS DATE, ON THE JUDGMENT ENTERED BY THE COURT ON 8/17/04.

[ ] Order and Certified Copy of Judgment
[x] Opinion and Certified Copy of Judgement
[ ] Order on Costs
[ ] Order dismissing appeal R42(b) or Local Rule 45
[ ] Other: _____
[ ] The record has been retained for use in case number _____

cc: Stephen Michael Barnett
Max Monroe